United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1033

To be argued by
MICHAEL B. POLLACK

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

JAMES LEONARD BROWN,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

JAMES LEONARD BROWN,

Defendant-Appellant

--x

Docket No.
77-1033

BRIEF FOR THE DEFENDANT
JAMES LEONARD BROWN

PRELIMINARY STATEMENT

James Leonard Brown appeals from a judgment of conviction entered on October 22, 1976 in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Charles S. Haight, Jr., United States District Judge, and a jury.

Indictment 76 Cr. 603 charges James L. Brown in nine counts with eight counts of use of the mails to employ a scheme or artifice to defraud in the offer and sale of securities

(Counts Two through Nine) and in Count One with conspiracy to use the mails to employ a scheme or artifice to defraud in the offer and sale of securities.

On October 14, 1976, the trial commenced and it ended on October 22, 1976, when the jury found Brown guilty on all nine counts. On December 23, 1976, Brown was sentenced on Count One to the custody of the Attorney General for a period of five years, six months of which are to be spent in a jail like institution and the execution of the remainder of the sentence of imprisonment was suspended and defendant placed on probation for a period of four and one half years, to commence upon his release from confinement. On counts two through nine the imposition of sentence was suspended.

Brown is presently incarcerated pending this appeal.

STATEMENT OF FACTS

On June 24, 1976, the defendant James Brown was indicted, along with Quido Benigno, Arthur Caponegro, Harvey Axelrod, John Krappman, Robert Smith and Arthur Daly, charged with violations of 15 U.S.C. Sections 77q(a) and 77(x). The basis of the charge is that the defendants sold counterfeit derived stock on the open market using the United States Mails to facilitate their scheme.

The essence of the charged scheme was that Chester Grey, an unindicted co-conspirator, and the appellant arranged with John Krappman, an employee in the stock transfer department of Manufacturers Hanover Trust Co. to remove a valid stock certificate to ascertain if it could be duplicated (Tr. 404). Krappman shared an apartment in Brooklyn with Arthur Daly who was employed as a truck driver in Appellant's carting business (Tr. 647). After an initial agreement that this would be done Krappman selected American Home Products Corporation (AHPC) stock, a company traded on the New York Stock Exchange, as the best choice for counterfeiting (Tr. 405). John Krappman delivered a cancelled certificate to Chester Grey, who along with appellant took same to Frederick Horowitz, an unindicted co-conspirator who owned a printing plant. They solicited Horowitz' opinion. Horowitz studied the stock and returned the sample certificate to Grey stating a cancelled certificate was no good for their purpose and he would have to see an as yet circulated certificate (Tr. 407). Chester Grey returned the certificate to John Krappman who stated he would need a week to get a certificate in an unissued form.

Shortly thereafter Krappman delivered a blank AHPC Certificate to Fred Horowitz, Chester Grey and appellant in Manhattan.

Horowitz took the certificate and within two days opined that the certificate could be duplicated. Grey and appellant went to Horowitz' plant, observed the copied certificates, Grey left with the counterfeit certificates and gave them to co-defendant Robert Smith (Tr. 407-409). A meeting was then held in a New York restaurant in which Grey and appellant asked Krappman if the certificates were good enough to avoid detection. Krappman suggested that certain lettering on the certificate needed to be raised to avoid detection (Tr. 410-411). Horowitz needed a special machine to accomplish this task.

After it was agreed the certificates were passable, John Krappman suggested that Gerald L. Smith was a good stockholder to use as the owner of the stock. Mr. Smith was the owner of a large quantity of stock and his account was particularly inactive. The agreed upon plan was to submit the counterfeit stock in the name of Gerald L. Smith to the transfer agent in large denomination certificates. To request these certificates be cancelled and the equivalent shares be returned by the transfer agent in smaller denomination certificates. Once the counterfeit certificates were cancelled John Krappman was to remove them from the transfer agent's vault.

Chester Grey next initiated conversations with James Phillips, an unindicted co-conspirator who had previously had an extensive background in the financial community. Grey testified that initial discussions centered on selling the certificates outside the country (Tr. 412) but this idea was quickly abandoned. Phillips next approached Harvey Axelrod about the possibility of negotiating stock in New York. Axelrod agreed to become Phillips' partner (Tr. 50) and introduced Phillips to a relative by the name of Quido Benigno, a principal in Seed Capital Corporation. These three parties then worked out an arrangement wherein Benigno would receive 25% of the proceeds for his participation in negotiating the stock and Phillips and Axelrod would each receive 12-1/2% of the proceeds. All conversations with Phillips and Axelrod in the initial stages also involved Chester Grey. In September 1972, Grey was due to be incarcerated, and at a meeting in Queens, New York the appellant told Phillips and Axelrod he would assume Grey's role concerning the sale of the AHPC stock (Tr. 57, 58). Appellant gave a counterfeit and an original security to James Phillips and Harvey Axelrod who thereupon showed said certificates to Quido Benigno (Tr. 59, 60). The three parties agreed that the counterfeit certificates were passable and opened a brokerage account and a trading account in the name of Gerald L. Smith. Harvey Axelrod signed both forms.

James Phillips brought the bulk of the counterfeit stock certificates representing approximately 18,000 shares, to Harvey Axelrod, who then took them to Seed Capital Corporation's offices at 61 Wall Street, signed Gerald L. Smith's name to the back of the certificates, and with Quido Benigno, submitted them to the transfer agent for cancellation and reissue of genuine certificates in smaller share denomination certificates (Tr. 66). After receiving the legitimate share certificates Axelrod again signed Gerald L. Smith, and Quido Benigno put the certificates in for transfer. In total, approximately 13,000 shares of AHPC stock was negotiated in this fashion, yielding a net return of about 1.6 million dollars on three occasions during October and November 1972. Each time certificates were transferred they were delivered by hand to the transfer agent and the proceeds of sale were picked-up by hand from the transfer agent. After receipt of the check Harvey Axelrod would again sign the endorsement of Gerald L. Smith to the check and then, with the aid of Quido Benigno and a J. S. Love, would cash the check at the Irving Trust Company on Wall Street. The three checks were in the approximate amounts of \$275,000, \$279,207.50 and \$875,000 (Tr. 73-79). The money was then taken to Seed Capital Corporation where Axelrod and Benigno behind closed doors separated it into four piles: 25% for

Benigno which he then put into his office safe; 12-1/2% for Axelrod which he put into his pocket, and subsequently took to his wife's safe deposit vault; 12-1/2% for James Phillips, which Axelrod delivered later that day in the lobby of his apartment house or in his apartment itself; and 50% which Axelrod understood was to go to the appellant, which he delivered to James Phillips and never saw again. The record is devoid of any facts indicating personal knowledge of appellant's receipt of any money (Tr. 164). In fact, after the scheme was discovered and SEC troubles befell Seed Capital Corporation, Quido Benigno requested financial aid in terms of legal fees from Harvey Axelrod, in response to which Axelrod provided Benigno with $25,000. Subsequently, a similar request was made to appellant who refused said request and who, in fact, denied any obligation toward Benigno (Tr. 87).

Winfield Schweikart, a managing partner of Schweikart & Company, testified that his company sold shares of AHPC on behalf of Seed Capital Corporation in late October and early November 1972 (Tr. 339). He testified that confirmations of these sales were made from his company's office at 2 Broadway to the office of Seed Capital Corporation at 61 Broadway, and that the purpose of these confirmations was to notify the individual of the precise terms of the transaction he

had authorized to be consummated in his behalf (Tr. 345). Schweikart additionally testified that all the information contained in the confirmation had previously been communicated to Seed Capital Corporation by telephone immediately upon completion of the transaction. Receipt of this information precedes delivery of the confirmation by at least 24 hours (Tr. 346-351).

James M. Avena, Operations Manager for Weeden & Company, testified that during a similar period of time his company sold on three occasions AHPC stock for Seed Capital Corporation. He testified that it was the common practice of his company to mail confirmations, except in limited and specified situations (Tr. 359). Absent those specific exceptions, he felt sure that the confirmations in this case had been mailed, but acknowledged that he could not be altogether positive (Tr. 372-377). The witness confirmed a portion of the testimony of Mr. Schweikart, stating that the details of the sale were immediately communicated to Seed Capital Corporation by telephone and this communication was followed up by the written confirmation. Thus confirmations act as record keeping devices only; in that prior to their receipt both parties know the terms and extent of the transaction they have entered into.

Ralph Montuori, the Office Manager of Loeb, Rhodes & Company, testified concerning the confirmations of the sale by Loeb, Rhodes and Company of AHPC stock presented to it by Seed Capital Corporation. Mr. Montuori's testimony was largely cumulative of Mr. Schweikart and Mr. Avena. However, he did add that there was no record of who purchased the stock sold by Loeb, Rhodes & Company.

The record is barren concerning the sale of the counterfeit derived stock to the Public. There is no testimony that any investor was misled or defrauded in any degree. In fact, not a single investor who purchased counterfeit derived stock was called as a witness by the Government. The Government's witnesses consisted of Harvey Axelrod, Chester Grey and John Krappman. James Phillips, the only witness who might have corroborated Harvey Axelrod's testimony that he gave up 50% of the proceeds of the scheme, was never called to testify. His absence is more glaring considering that Harvey Axelrod identified him as the only witness who was able to testify whether or not the appellant realized a "farthing" from the alleged scheme.

ARGUMENT

I. THE FRAUDULENT SCHEME DID NOT HAVE A SUFFICIENT IMPACT ON INVESTORS AND THE USE OF THE MAILS WAS NOT A SUFFICIENT PREDICATE FOR FEDERAL JURISDICTION

A. The Scheme To Defraud

Viewing the evidence in this case in the light most favorable to the government the scheme that was proven was designed to defraud Manufacturers Hanover Trust Co. ("Manufacturers") and Irving Trust Company, and the mailings of confirmations of purchase or sale to the defendants did not provide a sufficient predicate for federal jurisdiction. The evidence adduced at trial revealed a scheme in which the defendants presented a counterfeit stock certificate representing 13,000 shares of American Home Products Corporation (AHPC) to AHPC's transfer agent, Manufacturers. The certificate, which bore a forged endorsement of "Gerald L. Smith" guaranteed by the Irving Trust Company, was cancelled by Manufacturers and several certificates of smaller denominations were issued as replacements. Subsequently, the defendants dealing through Seed Capital Corporation, sold these stocks through brokerage houses to investors. The only mailings relied upon to create a basis for Federal jurisdiction are confirmations of purchase or sale which were mailed from the brokerage houses to Seed

Capital Corporation. It is significant that these mailings occurred after the issuance of legitimate replacement stock by Manufacturers in reliance upon the surrender of the counterfeit certificate; that virtually all of the relevant data contained in the confirmations had been agreed upon and communicated to the defendants prior to the mailings; and that the mailings had no impact upon the investors.

Of interest is the fact that not a single investor testified at trial. No proof was adduced at trial that any investor who purchased the AHPC stock sold by the defendants suffered a loss or was in any way duped or misled into buying worthless securities. This failure of proof is not surprising when it is considered that this scheme worked a fraud upon Manufacturers and Irving Trust Company and not upon investors.

B. The Scheme Did Not Have An Impact Upon the Investors

The Securities Laws were designed to protect unwary investors. Kistner v. United States, 332 F.2d 978, 981 (8th Cir. 1964). In the instant case the investors who purchased the legitimate AHPC stock from the defendants assumed no risk. Their financial positions remained unchanged. See UCC §8-311; Rand v. Hercules Powder Co., 129 Misc. 891, 223 N.Y.S. 383 (Sup. Ct. N.Y. 1927). In pertinent part UCC §8-311 provides that:

> "Unless the owner has ratified an unauthorized endorsement or is otherwise precluded from asserting its ineffectiveness
>
> (a) he may assert its ineffectiveness against the issuer or any purchaser for value and without notice of adverse claims who has in good faith received new, reissued or re-registered security on registration of transfer; . . ."

Therefore, when the replacement certificates were sold to innocent investors for value and AHPC in the usual course of such transaction registered such transfers, the investors owned the securities free of any adverse claims of the original owner, Gerald L. Smith. But this is only one side of the coin. What of the rights of Mr. Smith vis-a-vis the transfer agent who negligently permitted the original re-issue based upon a counterfeit certificate bearing a forged endorsement and the subsequent transfer of the replacement certificates again bearing forged endorsements?

In this respect, the risk of financial loss was borne by Manufacturers and/or Irving Trust Co. As the duped transfer agent who permitted an over issuance of stock, Manufacturers (acting in behalf of the issuer, AHPC) had the fiduciary obligation to restore Gerald L. Smith to his original position by buying securities reasonably available on the open market and either cancelling that stock or delivering

it to Mr. Smith in exchange for the erroneously cancelled certificate owned by Smith. UCC §8-104; see alsc, Prince v. Childs Co., 23 F.2d 605 (2d Cir. 1928); Mohr v. J.C. Penney Co., 242 App. Div. 385, 275 N.Y.S. 50 (1st Dep't. 1934). This result is mandated by UCC §8-104 (1)(a) which provides:

> "The provisions of this Article which validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in overissue; but
>
> (a) if an identical security which does not constitute an overissue is reasonably available for purchase, the person entitled to issue or validation may compel the issuer to purchase and deliver such a security to him against surrender of the security, if any, which he holds; . . ."

While UCC §8-104(1)(b) provides for the alternate remedy of damages if identical securities which do not constitute an overissue are not reasonably available for purchase, this alternate remedy provision has no realistic application to the case sub judice. As a public corporation whose shares are traded on the New York stock exchange, there is in reality no possibility that Manufacturers could not find reasonably available identical securities which do not constitute an overissue.[1]

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1. In fact, it appears that Manufacturers did buy and cancel sufficient securities to cure the overissue. See Civil Amended Complaint in Manufacturers Hanover Trust Co. v. Arnold, Exhibit A annexed to Memorandum of Law in Support of James Leonard Brown's Motion For Judgment of Acquittal, Appendix at .

It is thus apparent that the fraud proven at trial was not upon investors and therefore was not within the pervue of §77Q(a) of Title 15, U.S. Code. United States v. Ashdown, 509 F. 2d 793, 799 (5th Cir. 1975).

C. The Mailings Were Not Sufficient To Sustain Federal Jurisdiction

Even if the scheme to defraud in this case be considered within the pervue of the statute, there is an insufficient nexus between the mailings and the scheme to defraud to support federal jurisdiction. While it is settled that the statutory requirement that the mails be used in employing a scheme to defraud is solely for the purpose of creating a basis for federal jurisdiction and that it need not be central to the fraudulent scheme, United States v. Cashin, 381 F.2d 669 (2d Cir. 1960), nevertheless, there must be a sufficient nexus between the use of the mails and the fruition of the scheme to defraud. "[W]hat must be shown is that the scheme had an impact on the investor and that the mails were used in employing this scheme." Id. (emphasis added); United States v. Schaefer, 299 F. 2d 625, 629-30 (7th Cir.) cert. denied, 370 U.S. 917 (1962). This limitation is necessary to give force to the statutory purpose of protecting the unwary investor and to prevent the extension of federal jurisdiction

to every situation involving a fraud which in some way, no matter how remote, relates to a securities transaction.[2]

As stated previously, a scheme directed at the transfer agent, Manufacturers, which was complete when Manufacturers issued replacements for the counterfeited AHPC stock certificate, was in no way dependent upon the subsequent mailing of confirmations. Those mailings were neither utilized in employing the scheme nor relied upon or even seen by the investors. In fact, their only purpose was to transmit to the defendants facts of which they previously were aware. (Tr. 346-351, 366-367).

The instant case is distinguishable from cases which have held that mailings of confirmations are sufficient to sustain federal jurisdiction in security fraud cases. In many of those cases the fraud was designed to dupe the unwary investor and the confirmation was usually mailed by the defendant or an intermediary to the victimized investor. United States v. Pollack, 534 F.2d 964, 972 (D.C. Cir. 1976).

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2. The testimony presented on the issue of mailings of confirmations seems to establish that every sale of securities must involve the mailing of a confirmation. (Tr. 341).

(confirmation letters sent to purchasers of stock helped to create impression of valid sale and aided further sales); United States v. Ashdown, supra (defrauded investors received stock certificates or confirmations in mails); McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965) (defrauded investors received stocks or confirmations in mail); United States v. Schaefer, supra (mailings to investors after fraudulent representations); United States v. Cashin, supra (use of mail to confirm purchases induced by fraud). Clearly, in those situations the mailings were integral to the sales transactions and further served the purpose of maintaining the appearance of regularity and lulling the investors into a false sense of security. E.g., United States v. Marando, 504 F.2d 126, 129-30 (2d Cir.) cert. denied, 419 U.S. 1000 (1974).

It is therefore submitted that mailings of confirmations are not a sufficient predicate for federal jurisdiction in this case.

II. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE WRITTEN AGREEMENTS BETWEEN THE GOVERNMENT AND THE WITNESSES AXELROD AND KRAPPMAN.

A. Content of the Written Agreements

The initial question posed to both witnesses, Mr. Krappman and Mr. Axelrod by the Government was "Mr. [witness], in connection with this case do you have an agreement with the Government?" (Tr. 47, 643). After asking the witness to briefly describe his recollection of the agreement, the Government moved, over objection, to introduce the written agreement between the witness and the United States into evidence. (App.).

The defendant realizes that the Government has a duty to disclose the details of any plea bargain agreement it may have with a witness. United States v. Nicholson, 525 F. 2d 1233, 1236 (5th Cir.) cert. denied, --U.S.-- (1966). However, this duty was more than met by the seminal questions asked of each witness. By moving to introduce the written agreements into evidence the Government sought to place before the jury more than just the admissions of guilt of the two witnesses. In addition to the agreement to plead guilty the Government placed into evidence for the jury's consideration other matters which the jury was not entitled to consider. United States v. Boyce, 340 F.2d 418,

420 n. 9 (4th Cir. 1964); see also, Oliver v. United States, 355 F.2d 724 (D.C. Cir.1964); United States v. Fleetwood, 528 F.2d 528 (5th Cir. 1976) ("one of the purposes in putting the [witness] on the stand was to disclose the fact that he had, under similar circumstances, plead guilty to receiving bribes." Id. at 533). The agreements between the defendants Harvey Axelrod and John Krappman and the United States contains the following information:

> [Codefendant] shall plead guilty only to a securities count . . . as a result of his role in a scheme involving the transfer of counterfeit American Home Products and the subsequent sale of counterfeit derived American Home Products stock occurring in 1972, . . .
>
> [Codefendant] shall give testimony at trial . . . as to his complete knowledge and participation in the above-described scheme . . .
>
> Additionally, [codefendant] agrees that he will testify truthfully as to all facts within his knowledge relating to the above-described scheme.

B. The Agreements Contained Hearsay Which Should Not Have Been Submitted To The Jury

Beyond the sole fact that the co-defendants had pled guilty, the remainder of the above information provided the jury in the written agreements was hearsay and should not have been made available to the jurors. Unlike an agreement which relates to a witness' state of mind, the assertion quoted above, are only meaningful when considered for the truth of

the declarations contained therein, i.e. that the witness has testified completely and truthfully, that he was part of the alleged scheme described in some detail.

It is submitted by the defendant that the formalized nature of a written agreement between a witness and the Government lends undue credence to its content. Furthermore, each document contains language to the effect that the witness and government agree that the witness "will testify truthfully as to all facts within his knowledge relating to the above-described scheme." (App.). This language, in effect, suggests that the government is vouching for the truthfulness and credibility of its witness and his testimony as it relates to the government's allegations concerning the nature of the alleged crime. Such vouching for truthfulness and credibility, which cannot be contested by cross-examination is both improper and prejudicial. United States v. Martinez, 466 F.2d 679 (5th Cir. 1972); United States v. Johnson, 331 F.2d 281 (2d Cir.), cert. denied sub. nom, Pherido v. United States, 379 U.S. 905 (1964). This court should take cognizance of the fact that at the time the agreements were admitted into evidence by the Court no precautionary instructions were given to the members of the jury as to the purposes for which these documents could be considered. (Tr. 48, 643).

C. The Admission of the Agreements In Evidence Was Prejudicial Error

In considering the prejudicial effect of this error this court must determine whether there is a reasonable possibility that the evidence contributed to the conviction. cf. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). The undeniably prejudicial character of this evidence is revealed through two separate and distinct trial events. Initially, the prosecutor utilized this evidence in his rebuttal to the defendant's summation (Tr. 1112) and secondly, the jury, after having deliberated for a significant period of time specifically requested that these documents be brought into the jury room (Tr. 1193). Therefore, it is apparent that the agreements were both stressed by the prosecutor and relied upon by the jury. In United States v. Frattini, 501 F.2d 1234 (2d Cir. 1974) this Court was confronted with a factually analagous case concerning the introduction into evidence of a document containing comments by an agent of the Federal government. In Frattini the judge allowed into evidence a chemist's report, which in addition to the chemist's finding, contained a written notation discussing the substance of the alleged crime. The present case and Frattini both concern the admission into evidence of:(1) a written document; (2)containing statements by an agent of the United States Government; and (3) discussing the substantive aspects of the

alleged crime or scheme; and (4) although a witness testified as to each document and was available for the purpose of cross-examination, when the document was sent to the jury room such cross-examination was not appended to it. In reversing the conviction in Frattini this Court stated:

> Moreover, the erroneous receipt of these comments in evidence cannot be viewed as harmless since the prosecutor stressed them in summation, and the jurors were allowed to examine the exhibit during their deliberations. U.S. v. Frattini, 501 F.2d 1234, 1236 (2d Cir. 1974); See also United States v. Ware, 247 F.2d 698 (7th Cir. 1957).

The admission of these agreements into evidence and their subsequent transmittal to the jury room permitted the jury to have before it not only the recollection of the testimony given from the stand, but in effect permitted the government's witnesses to accompany the jury into the jury room. United States v. Brown, 451 F. 2d 1231 (5th Cir. 1971). As was stated by this Court in Frattini, supra.

> We cannot therefore say that this highly significant piece of evidence, specifically requested by the jurors for scrutiny in the jury room, did not effect their view of the case or influence them to defendant's detriment. Id. at 1236; cf. United States v. Brown, 451 2d, supra at 1231.

Defendant Brown is aware of this Court's decision in _United States v. Aloi_, 511 F.2d 585 (2d Cir. 1975) and suggests that it is distinguishable from the present facts for several reasons. Unlike _Aloi_ the present agreements contain more than an assertion that the witness will testify truthfully. In addition, these agreements were in writing and sent into the jury room during its deliberations at the request of the jury. Other areas of difference include: (1) there was a protracted trial in _Aloi_ compared to six (6) days in the present case, and (2) the witnesses in _Aloi_ were subjected to an extensive cross-examination lasting several days, whereas an examination of the record will show that the witnesses Axelrod and Krappman were extremely evasive during their cross-examination and particularly when asked questions concerning their agreements with the government. The precedential value of _Aloi_ must be considered in light of the Court's remarks:

> However, whether this incident deprived appellants of a fair trial must be considered in light of all the circumstance. _Id._ at 598.

Accordingly, it is submitted by the defendant that the admission of the agreements between the United States government and the witnesses John Krappman and Harvey Axelrod contain the possibility of prejudice to the defendant which requires a reversal of the defendant's conviction.

III. THE TRIAL COURT ERRED IN INFORMING THE JURY THAT FIVE CODEFENDANTS HAD PLEADED GUILTY.

A. The Court Informed The Jury Of Matters Not In Evidence

The original indictment in 76 Cr. 603 charged seven defendants with the commission of the alleged scheme to defraud. From this group, five pled guilty prior to the start of trial; leaving the defendants Brown and Daly before the jury. Of the five defendants who pled guilty only two, John Krappman and Harvey Axelrod appeared and testified at the trial. During the course of each witnesses' testimony the prosecutor elicited the fact that each had entered into an agreement with the government in which he agreed to plead guilty to one of the crimes alleged in the indictment. Nevertheless, and without any evidence in the record to support his assertion, during the course of his instructions to the jury the trial judge stated that <u>five</u> defendants had pled guilty in this case.

B. The Guilty Pleas of the Three Non-Testifying Codefendants Were Improperly Admitted Into Evidence

As a general rule a guilty plea of a codefendant is not admissible as evidence against the remaining defendants. <u>Freije v. United States</u>, 386 F.2d 406, 411 (1st Cir. 1967)

cert. denied, 396 U.S. 859 (1969) (and cases cited therein); *see also*, *United States v. Bryza*, 522 F.2d 414 (7th Cir. *cert. denied*, --U.S.-- (1976) (1975) ("Guilty pleas of codefendants should be brought to the attention of the jury in only certain narrow instances"). In the case *sub judice*, no evidence was introduced concerning the guilty pleas of any codefendants save those of Messrs. Axelrod and Krappman. It is submitted that this is not the usual case where the guilty pleas of other defendants are brought out in the course of the testimony of co-defendants or to explain that pleas have occurred during the trial. *See*, *United States v. Aronson*, 319 F.2d 48 (2d Cir. 1963). Accordingly, if the prosecutor had attempted to introduce the guilty pleas of the codefendants Caponegro, Benigno and Smith during the trial without placing each of them on the witness stand, the trial court would have been bound to sustain the objection of the defendant Brown on the grounds of hearsay and relevance.

Rule 605, Fed. R. Evid., prohibits the presiding judge at trial from testifying as a witness in that trial. In his scholarly commentary on this section of the rules the Honorable Jack Weinstein, United States District Judge, Eastern District of New York, extends this prohibition by analogy to include instances of judicial testimony where the judge refers to facts of which he has personal knowledge. Weinstein, J. &

Berger, M., WEINSTEIN'S EVIDENCE ¶605 [04]. Through his instructions the presiding judge placed before the jurors' matters not in evidence and, therefore, beyond the defendant's ability to confront and contest by cross-examination. The judge, thereby, entered into evidence "confessions of guilt" on behalf of the three non-testifying codefendants which were not limited to a proper evidentiary purpose, *e.g.*, to reflect upon a witness' credibility. *United States v. King*, 505 F.2d 602 (5th Cir. 1974). These facts placed into evidence by the court may have reasonably led the jury to believe that there was other evidence, unknown or unavailable to the jury, on which the prosecution or the court was convinced of the defendant's guilt. *Gradsky v. United States*, 373 F. 2d 706, 710 (5th Cir. 1967).

C. The Improperly Admitted Evidence Was Prejudicial To The Defendant Brown

In determining this issue the standard that should be applied by this Court is whether a reasonable probability exists that the "evidence" of the guilty pleas of the three non-testifying codefendants was prejudicial to the defendant Brown. *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963); *see also*, *United States v. Boyce*, 340 F.2d 418 (4th Cir. 1964). In *Fahy* evidence obtained as a result of an unlawful search

and seizure was admitted into evidence. In reversing the conviction the Court stated:

> We are not concerned here with whether there was sufficient evidence on which the [defendant] could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. supra, at 86-87.

This standard was similarly applied in Boyce where the confession of a codefendant, who pled guilty before trial, was admitted into evidence. In reversing, the Court of Appeals, relying upon Fahy stated:

> If there is only a reasonable probability that the confession was prejudicial to [defendant], his conviction cannot stand. United States v. Boyce, 340 F.2d supra, at 420.

In the present case, as in Fahy and Boyce the determination of this issue depends upon the effect of excludable evidence improperly admitted by the trial court. The prejudice to the defendant Brown is magnified by the fact that the "evidence" was presented to the jury by the judge during his instructions. At this juncture in the proceedings the judge informed the members of the jury that they must accept his instructions as being correct. In addition, this "evidence" acquired even greater force and

effect from the aura of authority of the trial court. Furthermore, this "evidence" was interjected at a time when the defendant was unable either to examine the three non-testifying codefendants concerning their pleas or to comment to the jury concerning the individuals entering the pleas. This comment from the lips of the trial judge permitted the members of the jury to speculate about the particulars of the pleas and, in addition, to conclude that if five of seven defendants plead guilty then the scheme as alleged must have existed. Accordingly, it is submitted there exists a reasonable probability that the reference to guilty pleas of three codefendants who did not testify at trial prejudiced the defendant Brown and, therefore, the conviction must be set aside and a new trial ordered.

IV. <u>CONCLUSION</u>

For the above-stated reasons the defendant James Leonard Brown submits that the verdicts of the District Court should be set aside and the indictment dismissed, or in the alternative, a new trial ordered.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

.S. U.S. COURT OF APPEALS
SECOND CIRCUIT

Index No.

UNITED STATES OF AMERICA,
Appellee,

- against -

JAMES LEONARD BROWN,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Reuben A. Shearer being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030

That on the 7th day of March, 1977 at One St. Andrews Plaza New York, N.Y.

deponent served the annexed Brief upon Robert Fiske Jr. U.S. Atty. Southern District

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 7th day of March, 1977

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer

BEST COPY AVAILABLE